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No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

ALLIED TUBE & CONDUIT CORPORATION,

Petitioner,

—vs.—

INDIAN HEAD, INC.,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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QUESTIONS PRESENTED

In an effort to influence state and local legislative enactment of the National Electrical Code ("NEC"), a model code prepared by the National Fire Protection Association ("NFPA") which is widely disseminated and adopted in legislative codes, petitioner "packed" an NFPA meeting seeking to prevent inclusion of respondent's product in the NEC on the ground of its toxicity and dangerousness. The action violated no rule of the NFPA. There was scientific evidence, believed by petitioner, that respondent's product was unsafe. Petitioner also acted on the recognition, however, that its success at the NFPA would, if followed by legislative enactment of the NEC, restrain the competition of that product. The questions presented are:

1. Whether petitioner's action in the NFPA meeting could be held an actionable restraint of trade leading to treble damages under the Sherman Act consistently with *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), and succeeding decisions of this Court further defining the doctrine of that case.

2. Whether, even without regard to the *Noerr* doctrine, such lobbying and voting tactics, otherwise lawful and in compliance with the rules of a code-making association, are proscribed by the Sherman Act if a jury finds they "subvert" the rules.

RULE 28.1 STATEMENT

Allied Tube & Conduit Corporation is a wholly owned subsidiary of Atcor, Inc.

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Petitioner, Allied Tube & Conduit Corporation ("Allied"), respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered on April 22, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals (App. A, *infra*, 1a-22a) is not yet reported. The oral opinion of the District Court (App. B, *infra*, 23a-32a) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on April 22, 1987. A timely petition for rehearing was denied on June 11, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The First Amendment to the Constitution of the United States provides in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech . . . or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

STATUTE INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.

STATEMENT OF THE CASE

1. The Facts

The facts giving rise to this case are well stated in the opinion of the Court of Appeals. (App. 3a-8a.) That account is quoted here for convenience:[1]

"The evidence presented to the district court established the following. [Respondent] Carlon, a division of Indian Head, Inc., manufactures and sells flexible plastic electrical conduit made from polyvinyl chloride (PVC). Electrical conduit is hollow tubing used in building construction to carry insulated electrical wires through floors, walls, and ceilings, and outside buildings, and to protect the wires from damage or abuse.

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1 Petitioner and respondent have been referred to, respectively, as Allied and Carlon throughout, and those designations are followed in this petition.

Carlon's product competes in the marketplace against steel conduit, of which Allied is the largest producer in the United States. Carlon claims that PVC conduit [also known as electrical non-metallic tubing or ENMT] has a number of significant competitive advantages over steel conduit, including its pliability, its lower installed cost, and its lower susceptibility to short circuiting. On the other hand, as the district court instructed the jury, 'there is a scientific basis for a concern about safety of PVC products with respect to toxicity. . . . [T]he parties do not dispute that people disagree on the issue and there is an objective basis for a concern for safety.' Allied particularly stresses the fact that, during fires in high-rise structures, PVC conduit may burn, emitting toxic smoke and fumes.

"This case arises from Allied's efforts to block Carlon's proposal to include PVC conduit as a permissible type of electrical conduit in the 1981 edition of the National Electrical Code (NEC)—a model code, promulgated by the National Fire Protection Association (NFPA), which establishes product and performance requirements for electrical systems, including electrical conduit. The parties agree that NEC is the most widely disseminated and adopted model code in the world. The parties agree further that a substantial number of state and local governments adopt the NEC as law in whole or in part.

"Every three years, the NFPA—a private, voluntary organization composed of over 31,500 individual and group members representing industry, labor, academia, insurance, organized medicine, firefighters, and government—revises the NEC through a multi-step, several-year-long process. The NFPA first submits proposed amendments to the NEC to a Code-Making Panel (CMP) made up of professionals with technical expertise in the area. In order to prevent domination by special interests, no more than one-third of any CMP's membership may represent a single interest. If approved by the CMP, a proposal then goes to the full membership, together with the comments and voting position of each CMP member. After the membership has had an opportunity to comment on the proposal, the CMP considers it a second time, along with the membership's comments. If again approved, the NFPA pub-

lishes the proposed amendment to the full membership. The entire membership then votes.

"In 1980, when Carlon's proposal was being considered, a simple majority of those present at the annual meeting was sufficient to approve or reject a proposal. Disappointed members can appeal the membership's vote to NFPA's Standards Council and ultimately to its Board of Directors. Finally, NFPA rules also permit *de novo* review of a defeated proposal by the CMP, the Standards Council, and the Board of Directors, in a procedure known as a Tentative Interim Amendment (TIA). If adopted, a TIA includes or excludes a proposal on an interim basis until the next code cycle.

"On September 18, 1978, Carlon began the process of obtaining NEC approval for PVC conduit by submitting its proposal, known as Article 331, to the NFPA, along with a fact-finding report by the Underwriters Laboratories. The NFPA directed the proposal to CMP-8, which initially rejected it. However, in December, 1979, based on further fact-finding and field demonstrations by Carlon, CMP-8 reversed its earlier decision and approved Article 331 for review by the full membership. The NFPA then scheduled the article for consideration by the full membership at the next annual meeting, to be held in Boston in May, 1980.

"Recognizing that inclusion of PVC conduit in the NEC might adversely affect its sales of steel conduit, Allied's representatives met with a number of different groups, including other members of the steel industry, to gather votes in opposition to Article 331. On January 30, 1980, the Steel Rigid Conduit and Electrical Section of the National Electrical Manufacturers Association (NEMA) held a meeting to discuss the matter. At that meeting, and at a full meeting of the NEMA Steel Section held in February, everyone agreed to bring as many voters as possible to the upcoming NFPA meeting; Allied itself pledged to bring at least 100 people to vote against Article 331. Additional meetings and communications were held among the steel interests to coordinate their efforts to block Article 331's adoption. Acting within the letter of NFPA

rules, Allied eventually arranged for 155 persons—including employees, sales agents, the agents' employees, company executives, employees of two of Allied's divisions, and the wife of the national sales director—to join the NFPA, to register as voting members, and to attend the annual meeting to vote against the proposal. Allied also paid over $100,000 for the membership, registration, and attendance expenses of these voters. The other steel interests similarly recruited and paid for the expenses of voters at the May, 1980 meeting. In total, the steel interests gathered 230 votes.

"Carlon made no attempt to sign up additional employees or sales agents other than the four already scheduled to attend the meeting. Until about April 18, 1980, H.F. van der Voort, who coordinated Carlon's efforts to amend the NEC, apparently believed that the NFPA's rules did not permit a motion from the floor to return Article 331 to CMP-8. On or about April 18, van der Voort discovered that such a motion could, in fact, be made. By this time, Carlon could not have signed up additional members to vote at the May meeting; under NFPA rules, only those who have been NFPA members for at least 30 days could vote at an annual meeting. However, Carlon did solicit support from members of the Society of Plastics Industry, the NEMA plastics section, other members of the plastics industry, NFPA's railroad and health care sections, and the Fire Marshals Association of North America.

"At the annual meeting, Allied instructed its personnel where to sit, based upon a detailed seating chart, and appointed group leaders to instruct the voters 'how the discussion is progressing and how to vote.' Boxed lunches were provided and the voters were told to 'stay nailed to their seats' until the end of two evening sessions. Group leaders used walkie-talkies and hand signals to facilitate communication. Few of Allied's voters had any of the technical documentation necessary to follow the meeting; nor did any of them speak in opposition to Article 331 in the course of the meeting.

"Two votes were taken on the motion to return Article 331 to CMP-8. The first, a voice vote, was inconclusive. The second, a standing vote, approved the motion by a vote of 394-390. To insure its victory, Allied insisted that its representatives remain in their seats until 2:00 a.m., when the NFPA membership voted to approve the entire NEC, without Article 331. [The voting session began after 1:00 p.m. and lasted over 12 hours, with the debate on Article 331 consuming about thirty minutes. (A. 605-06, 1760-80, 3456.)[2]] Carlon immediately appealed the decision of the membership to the Standards Council, which referred the appeal to the Board of Directors. Finding that the NFPA rules had been circumvented but not violated, the Board denied the appeal, and returned Article 331 to the CMP-8. In June, 1980, Carlon applied for a TIA including Article 331 in the 1981 NEC. After the proposed TIA wound its way through the various levels of the code-making process, encountering opposition by Allied at each step, a subcommittee of the Board of Directors found that Carlon's request was not sufficiently exigent to warrant issuance of the TIA."[3]

Although not mentioned in the Court of Appeals opinion, it is relevant that, in January, 1983, the newly established NFPA Advisory Committee on the Toxicity of the Products of Combustion ("TAC"), created in response to the issues raised by the NFPA's handling of Article 331, reviewed all proposals for the 1984 NEC with regard to toxicity, including Article 331, which had been resubmitted by Carlon. (A. 3312, 3338-43.) In February, 1983, the TAC recommended, "based upon its best judgment of the known hazards involved," that the uses of ENMT be restricted to structures less than three stories in height. (A. 3024-26.) Article 331 was amended in accordance with TAC's recommendation and added to the 1984 NEC.

2 This and similar references are to the Joint Appendix in the Court of Appeals.

3 The NFPA Board of Directors was greatly concerned about the toxicity issue and "simply did not want to run the risk of compounding the [safety] problem when, in fact, [they] needed considerably more data than was available at the time." (A. 2843-44.)

2. The Claims and Defenses

Carlon began this action against Allied and the NFPA[4] on October 9, 1981, alleging that they, the American Iron and Steel Institute, other steel conduit manufacturers and Allied's independent sales agents had "combined and conspired to prevent competition from non-metallic tubing by excluding it from the 1981 NEC." (Complaint para. 17, A. 19.) The complaint stated that "[a]s promulgated by defendant NFPA, a private corporation, the NEC is advisory and does not carry the force of law." (*Id.* para. 13, A. 17.) But exclusion from the NEC was nevertheless alleged to cause injury because the NEC is routinely and "widely adopted" as law, "in whole or in substantial part," in statewide and municipal codes. (*Id.*)

Carlon's injury was alleged to flow directly from that legislative action in adopting the NEC:

> Because of the adoption and application of the NEC by states and municipalities as described in paragraph 13 above, the combination and conspiracy had and continues to have the following unlawful effects, among others:
>
> (a) Carlon has been almost wholly excluded from selling non-metallic tubing in competition with steel tubing manufactured by defendant Allied and others of the co-conspirators.

(*Id.* para. 30, A. 24.)

Carlon tried the case to the jury on that theory—that legislative adoption of the NEC was the cause of its injury.

Allied defended on a number of grounds. It did not dispute that it had engaged in an all-out effort to oppose Carlon's PVC product within the NFPA because the NEC is virtually the exclusive basis for governmental regulation of electrical installations within the United States. Instead, its answer asserted that its actions concerning the 1981 NEC "constituted valid lobbying activity" protected under the doctrine of *East-*

4 In August, 1982, Carlon discontinued its action against the NFPA. Terms of the settlement were not disclosed.

ern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965). (Answer para. 26, A. 31.) Allied also asserted that its activities were protected under the First and Fourteenth Amendments to the Constitution, were based on a good-faith, well founded belief that PVC products in fact constitute a danger to the public, were intended to make certain the NFPA considered toxicity in connection with Article 331 and other code provisions, and were in conformance with the NFPA's by-laws, standards and procedures. (*Id.* paras. 20-28, A. 30-31.) Among other affirmative defenses, Allied asserted that its actions and the alleged conspiracy had not proximately caused any injury to Carlon. (*Id.* paras. 35, 37, A. 33.) Any harm to Carlon would have resulted from the actions of state and local legislative bodies in enacting the NEC. (*Id.*)

3. The Verdict

At the end of a five-week trial on liability, the jury was asked to respond to 11 questions.[5] Its specific findings of fact, as distinguished from its conclusions, were as follows:

> Allied had a genuine belief as of May, 1980 that electrical nonmetallic tubing was unsafe. (A. 474A.)
>
> Allied acted at least in part on its belief that ENMT was unsafe in opposing Article 331. (A. 474D.)
>
> Allied's conduct did not violate any of the rules or regulations of the NFPA. (A. 474F.)
>
> The NFPA membership vote did not effectively determine whether Article 331 would be excluded from the Code. (A. 474H.)
>
> The NFPA rules and regulations were fair in that they provided a full and effective appeal from the vote of the membership. (A. 474I.)

5 A twelfth question "Was Allied genuinely attempting to influence the NFPA in opposing Article 331?" (A. 474E) was taken from the jury after Carlon conceded that there was no issue as to whether Allied genuinely attempted to influence the NFPA.

> Allied's conduct did not deprive Carlon of full and effective access to the NFPA. (A. 474J.)

In addition, the parties had agreed that the "exclusion of PVC conduit from the 1981 NEC was supported by objective scientific evidence." (App. 22a.)

The jury's other findings were that Allied's conduct was "a substantial or material factor in excluding Article 331 from the 1981 NEC" (A. 474K), "subvert[ed] the consensus standard making process of the NFPA" (A. 474G), did not "constitute the least restrictive means of effectively expressing Allied's opposition to the use of ENMT in the marketplace" (A. 474L), "adversely impact[ed] competition" (A. 474M), and "constitute[d] an unreasonable restraint of trade in violation of the antitrust laws" (A. 474N).

After further hearings on the issue of damages, the jury awarded Carlon $3.8 million, to be trebled, plus attorneys' fees. (A. 474O.)

4. The Judgment Notwithstanding the Verdict

Allied moved to set aside the verdict primarily on the ground that its conduct in connection with the 1981 NEC was protected from antitrust liability under the *Noerr-Pennington* doctrine.

The District Court granted the motion, holding that the *Noerr-Pennington* doctrine applies to conduct outside the legislative halls and is not limited to direct acts of petitioning the government. The court observed that Allied's activity within the NFPA was closer to the legislative process than the public relations campaign protected in *Noerr*. The code adopted by the NFPA, the court noted, "will almost inescapably be followed by the legislatures of the various states. . . . [T]he decision of the NFPA will be largely determinative of what the legislatures do." (App. 25a-26a.)

The District Court rejected Carlon's argument that Allied's conduct was so "reprehensible" and "outrageous" as to lose *Noerr-Pennington* protection. That activity was held to be "so

much a part of the traditional democratic process at every level of our society, from the local club right through the Congress itself," that it could not be deemed to be "so outrageous in and of itself so as to be unprotected." (App. 26a-27a.) Carlon had the "same opportunity to advocate its position before the NFPA" and "clearly [was] not excluded from that process in any way." (App. 30a.)

Finally, the District Court found that Carlon's injury, if any, flowed solely from the action of state legislatures in enacting the NEC, which excluded PVC conduit. (App. 29a-30a, 31a-32a.)

5. The Court of Appeals Decision

As primary grounds for reversal, the Court of Appeals held *Noerr-Pennington* inapplicable to activities within a private code-making body like the NFPA notwithstanding that the goal of these activities is adoption of the NEC as legislation throughout the nation. In so holding, the court acknowledged, it disagreed with three district courts elsewhere as well as Judge Sprizzo in this case. (App. 12a.)

The Court of Appeals found a vital distinction between "the submission of a group's recommendations to the government," which it deemed to be protected conduct, and "the antecedent conduct which generated those recommendations," which is not protected. (App. 17a.) In a footnote, the Court recognized that under *Parker v. Brown*, 317 U.S. 341 (1943), Carlon could not recover "for any injury arising from the adoption of the NEC by the various governments." (App. 9a n.3.) It concluded, however, that Allied's conduct had "caused independent antitrust injury to Carlon"—that is, injury apart from the exclusion by state legislatures—which "should not be excused merely because its actions also indirectly influenced state and local governments." (App. 17a.)

REASONS FOR GRANTING THE WRIT

The Court of Appeals has held that petitioner's lobbying and voting activity within a private code-making body—which admittedly had as its overriding purpose and ultimate goal the enactment of legislation favorable to it—constituted a Sherman Act restraint of trade punishable by treble damage liability. Though lobbying within the code-making body is the only effective way to influence ensuing legislation, the Court below has held *Noerr* inapplicable because it concluded that this lobbying only "indirectly influenced state and local governments" and was therefore too remote to "constitute petitioning of the government within the meaning" of *Noerr*. (App. 17a.)

The Court of Appeals has also based its decision in critical measure upon the premise that the Sherman Act may serve to proscribe private associational tactics that are otherwise lawful and within the association's rules and that are employed to further the expression of opinion on a matter of public interest and safety if a jury finds those tactics distasteful and "subversive."

The decision is clearly important and questionable under this Court's *Noerr* line of cases; it goes, in our submission, on a cramped and erroneous reading of those decisions. The refusal to accord *Noerr* immunity to lobbying activity within a private code-making association represents a wide extension of Sherman Act liability without precedent in any decided case. Indeed, the precedents directly in point—the three district court decisions cited in the opinion below in addition to the district court decision in this case—reach a conclusion on the *Noerr* issue exactly opposed to that of the Court of Appeals.

Private code-making bodies play an important role in the economic life of the country, as this Court has recognized in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 570 (1982). The decision of the Court of Appeals will severely constrain intra-organizational political conduct within a multitude of private code-making associa-

tions that have long provided the essential framework for state and municipal legislation.

Review by this Court is well merited. First, the decision gives the first federal appeals court answer to an important question of federal law, governed ultimately by sensitive First Amendment considerations. The Court of Appeals' answer cannot readily be squared with this Court's elaboration of the *Noerr* doctrine and with this Court's refusal thus far to outlaw under the Sherman Act political activity that has no direct marketplace impact. Second, the decision will have far-reaching political and economic consequences. If undisturbed, it will chill good-faith debate in private code-making bodies on issues of public concern and thus drastically alter the process by which legislation fixing safety standards, product specifications and licensing requirements has long been formulated at state and local levels.

1. The Court of Appeals decision misconceives the *Noerr* doctrine

The Court of Appeals' misreading of the *Noerr* doctrine begins with its underlying premise that *Noerr* is an exemption to be "construed narrowly" (App. 18a), and applied only to "direct" pressures upon the legislature. This Court held in *Noerr* that

> the Sherman Act does not prohibit two or more persons from associating together in an attempt to persuade the legislature or the executive to take particular action with respect to a law that would produce a restraint or a monopoly. . . . [S]uch associations . . . bear very little if any resemblance to the combinations normally held violative of the Sherman Act. . . . And we do think that the question is conclusively settled, against the application of the Act, when this factor of essential dissimilarity is considered along with the other difficulties that would be presented by a holding that the Sherman Act forbids associations for the purpose of influencing the passage or enforcement of laws.

365 U.S. at 136-37. Thus, *Noerr* is in no sense a narrow legislative exemption; it is, rather, in part a constitutionally based doctrine limiting the application of the Sherman Act. *Id.* at 137-38; *see California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508, 510-11, 515 (1972); Note, *The Noerr-Pennington Doctrine and the Petitioning of Foreign Governments*, 84 Colum. L. Rev. 1343, 1349-52 (1984) (immunity for petitioning has constitutional underpinnings but also reflects legislative intent, expressed in legislative history of Sherman Act, not "to use the antitrust law to regulate domestic efforts to influence the passage or enforcement of laws"); *cf. Hufsmith v. Weaver*, 817 F.2d 455 (8th Cir. 1987) (applying doctrine outside the antitrust area).

Equally important, the distinction drawn by the Court of Appeals between direct and indirect influence upon legislation is neither realistic in fact nor sound in law. The record makes clear that the effective route to Allied's goal was via the NFPA. For, in the words of the opinion below, the NEC is indisputably "the most widely disseminated and adopted model code in the world." (App. 4a.) As the District Court found, parties seeking to be heard with respect to the NEC must join the political process at the NFPA. The road to Albany, Phoenix and Sacramento begins at the NFPA. That Allied might have chosen the tardy and less effective course of lobbying directly the various legislative bodies that enacted the NEC—an alternative the Court of Appeals deems the only protected one—is at best irrelevant under *Noerr*.

In fact, the *Noerr* case involved "indirect" pressures on the legislature that were if anything far more remote from the legislative halls and offices than the pressures brought to bear by Allied through the NFPA. In the vicious struggle from which the *Noerr* case arose, the defendant railroad association had relied, and was protected in relying, upon a deceptive publicity campaign designed to destroy competitor truckers' goodwill and to promote support for legislation shackling the truckers' ability to compete. *See Noerr*, 365 U.S. at 129-30, 133. The deceptive publicity campaign was not aimed directly at the Congress and had the important, if not overriding,

purpose of injuring the truckers "in ways unrelated to the passage or enforcement of law." *Id.* at 133. But its ultimate purpose was to influence Congressional action. Though the conduct was found in substantial measure to be "reprehensible," *id.* at 145, it was protected against Sherman Act sanctions: "[N]o violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws." *Id.* at 135.[6]

The principles of *Noerr* apply here to the influence Allied sought to muster and the legislative goals at which it aimed. Allied's conduct was both more directly aimed at legislative goals and more plainly lawful than that of the railroad industry in *Noerr*. The District Court there found, and this Court accepted as true, "that the railroads' *sole* purpose in seeking to influence the passage and enforcement of laws was to destroy the truckers as competitors for the long-distance freight business." *Id.* at 138 (emphasis added). But that did not transform the railroads' conduct into a Sherman Act violation.[7]

By contrast, Allied engaged in no deception, spoke no untruth and acted not solely for economic reasons but in part, as the jury found, in a good-faith effort to protect the public

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6 The Court added:

> It is inevitable, whenever an attempt is made to influence legislation by a campaign of publicity, that an incidental effect of that campaign may be the infliction of some direct injury upon the interests of the party against whom the campaign is directed. And it seems equally inevitable that those conducting the campaign would be aware of, and possibly even pleased by, the prospect of such injury. To hold that the knowing infliction of such injury renders the campaign itself illegal would thus be tantamount to outlawing all such campaigns.

Id. at 143-44.

7 *Cf. United Mine Workers of America v. Pennington*, 381 U.S. 657, 670 (1965), construing *Noerr*:

> Joint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act.

from a product it believed dangerous. And Allied's activities were aimed directly at legislation: the NEC has a far more immediate and obvious legislative impact than the third-party publicity campaign in *Noerr*. Judged by the results, the NEC's influence upon legislation could not be any more direct. It provides the basis for substantially all legislatively enacted electrical codes in states and municipalities around the nation. A majority of states and cities adopt the NEC without amendment and many more do so with only minor amendments.[8]

If the defendants in *Noerr* were protected and if their activities were sufficiently "direct," despite the fact that they too could have confined themselves to pure petitioning, then surely Allied should enjoy similar protection for its effort to influence the passage of laws. Stated this way, the problem comes back into focus. It presents the *Noerr* issue in an apt perspective—a perspective from which three other federal courts, in addition to Judge Sprizzo herein, have reached a legal conclusion opposite to that of the Court below. *See Sessions Tank Lines, Inc. v. Joor Mfg., Inc.*, 1986-1 Trade Cas. (CCH) ¶ 66, 989 (C.D. Cal. 1986), *appeal argued*, No. 86-6208 (9th Cir. Apr. 18, 1987); *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F. Supp. 833 (N.D. Ill. 1983); *Rush-Hampton Indus. v. Home Ventilating Inst.*, 419 F. Supp. 19 (M.D. Fla. 1976).

2. The decision below expands the Sherman Act to reach and censor associational activities that are not within the statute

The Court of Appeals decision assumes the answer to a fundamental question which had to be addressed before the Court could logically deal with the *Noerr* immunity issue. The question is whether Allied's actions were Sherman Act restraints in the first instance. We submit that they were not and that the Court wrongly assumed that they were largely on the basis of the jury's "subversion" finding.

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8 See footnote 1 of Court of Appeals decision. (App. 4a-5a.)

In the words of the decision below, the gist of what Allied has been condemned for is that it "packed the annual meeting with newly registered members, whom it subsidized, for the *sole purpose of achieving an anticompetitive result—the exclusion of PVC conduit from the marketplace*." (App. 21a (emphasis added).) But the underscored language begs a prime question—whether Allied's sole purpose was, in effect, to achieve an anticompetitive trade restraint; and it does so by ignoring facts of the most vital importance found by the jury or conceded and by giving decisive weight to the unacceptably vague jury finding of "subversion."

The jury's fact findings—establishing Allied's good faith and its scientifically supported concern about toxicity,[9] Allied's conformity with the NFPA's rules, themselves found to be fair, and Carlon's full and effective access—have not the faintest look or sound of a Sherman Act violation. Without even coming to *Noerr-Pennington*, the findings of the jury show vigorous pressure in an open public arena to promote objectives more than tinged with a public interest. All for partly self-interested motives, to be sure. But the fact that political activity is directed against a competitor and is motivated in part by self-interest has never been thought to abrogate the

9 It bears mention that at the time the NFPA rejected Carlon's proposed TIA, the NFPA Board of Directors took immediate action to remedy the deficiency in its processing of the NEC that had left the toxicity question unanswered at the time Article 331 was presented to the membership. (A. 2840-41.) It established an ad hoc committee of national experts to address the issues of the toxicity and fire hazard associated with PVC. (A. 1582-84, 2841.) In December 1982, the NFPA Board of Directors unanimously established a standing committee to "provide guidance, as needed, to NFPA committees on the toxicity of the products of combustion." (A. 3309.) It also adopted unanimously a Policy Statement reaffirming the NFPA's recognition that "the toxicity of the products of combustion is an important factor in the loss of life from fire" and expressing "concern that the growing use of synthetic materials may produce more toxic or additional toxic products of combustion in a fire environment." The Board also appointed an Advisory Committee to provide specific guidance to the Technical Committees on "questions relating to assessing the hazards of the products of combustion." (*Id.*)

constitutional rights of free speech and association or, standing alone, to bring into play Section 1 of the Sherman Act.

On the jury's specific findings and the conceded facts, Allied was surely exercising its First Amendment rights. The critical factors—largely ignored by the Court of Appeals—are Allied's good-faith belief on a matter of palpable public interest and the "objective validity" of its safety concerns. Again, there was scientific evidence that Carlon's plastic conduit gave off life-endangering fumes when it burned. Allied's expression of its safety concerns about such a product in an open forum is deserving of First Amendment protection and should not have been dismissively characterized as a Sherman Act restraint. And its mustering of support to deny organizational and legislative sanction for that product is simply not the equivalent, practically or morally, of price-fixing. The Court of Appeals' suggestion to the contrary, implicit in its summary rejection of Allied's First Amendment-based defenses and its citation to *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927), is clearly mistaken.

To put the case in context, it helps to note what it is not about. It is not about denial of access to a legislative or administrative body (*cf. California Motor Transp. Co. v. Trucking Unlimited*, 404 U.S. 508 (1972)), for the jury found that Carlon had "full and effective access to the NFPA." (A. 474J.) It is not a case of an association adopting unfair rules intended to exclude a competitor from a critical market or deny it an important imprimatur. *Cf. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985); *Silver v. New York Stock Exch.*, 373 U.S. 341 (1963). Nor does it involve the illicit and fraudulent use of the standard-setting process in support of an anticompetitive end, or direct action in the marketplace by competitors acting together—for example, price-fixing, a group boycott, or an agreement to allocate territories or customers. *Cf. American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978); *Fashion Originators' Guild of America, Inc. v. Federal Trade Comm'n*, 312 U.S. 457

(1941); *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979).

This is not a case involving use of market power at all. Allied used only political power, the power to persuade, to associate with others, and to vote. In rounding up 155 votes (out of a total electorate of 31,500) and otherwise supporting its position, Allied used tactics that were, as Judge Sprizzo observed, in common usage in the Congress and elsewhere in the American political system. (A. 2028-31.) Contrary to the Circuit's negations, Allied was indeed engaged in "political activity" in a "political arena." (App. 19a.)

It should make no difference that the jury accepted the invitation to find that this conduct "subverted" the NFPA process. The jury had no guidance as to the meaning of "subverted." More importantly, we submit, there was no tenable meaning on which the jury could have been permitted to transmute Allied's admittedly crude tactic, found by the jury to be conformable to the NFPA rules and equally available to Carlon, into a Sherman Act violation.

The Sherman Act nowhere prescribes conduct or limits pressure tactics within a private standard-setting organization any more than it does shareholder conduct within a corporation, the internal behavior of members of a partnership or the membership of a club or trade association. So far as the Sherman Act is concerned, it is the *external* result—the outward behavior of the entity—that is to be judged when there is a claimed restraint of trade. If that behavior is price-fixing or a boycott, it violates the Sherman Act. There is no such violation when, as here, the behavior is withholding organizational approval for a product for which there is objective, scientific evidence of life-endangering toxicity.

To say that the result came from "subversion" of the entity's own rules of procedure or decision is not to say anything relevant under the Sherman Act. On the contrary, to fashion sanctions on such a theory moves unacceptably toward restricting "the practice of persons sharing common views banding together to achieve a common end"—a practice "deeply embedded in the American political process." *Citizens Against Rent Control v. City of Berkeley*, 454 U.S. 290, 294 (1981). As the cited case reminds us, limiting how much people may give or what they may do to bring their associations to support their interests is a subject highly sensitive under the First Amendment, quite without regard to special doctrines like *Noerr-Pennington*. Even if some people were brought to support associational goals by "intimidation" or "threats," this could not be a ground of proximately caused damages and recovery consistent with the rights assured by the First Amendment. *NAACP v. Claiborne Hardware Co.*, 458 U.S. 886, 921-22 (1982).

3. The decision below misreads the theory and nature of Carlon's damage claim in its analysis under both *Noerr* and *Parker v. Brown*

There is another gap in the Court of Appeals' antitrust analysis. In and of itself, Allied's vote packing and other activity at the NFPA meeting—the supposedly unprotected "antecedent conduct" cited by the Court of Appeals (App. 17a)—caused Carlon no harm. Carlon suffered injury only when state and local legislatures enacted the NEC without Article 331. (*See, e.g.*, Complaint paras. 13, 30, A. 17, 24.) But that brings the case squarely within the *Noerr-Pennington* rule and within *Parker v. Brown*, 317 U.S. 341 (1943).

The Court of Appeals decision skips over this issue by misreading the trial record on Carlon's damage theory and by assuming that Carlon went to the jury on the theory that the NFPA vote "stigmatized" its product and that Allied "marketed" the stigma. (App. 9a & n.3.) In truth, Carlon suffered, claimed, and proved damages only for injury attributable to legislative enactment of the NEC: the only theory on which Carlon litigated the case, from complaint through trial openings, summation and verdict, was that the "adoption and application of the NEC by states and municipalities" excluded its ENMT product from the market (Complaint para. 30, A. 24). Reflecting the complaint, the record contains no evidence supporting the "stigma" theory or indicating that Allied "mar-

keted" the stigma, as the court phrased it. Judge Sprizzo did *not* submit the stigma theory to the jury because it was never claimed by Carlon during the trial and because there was no evidence introduced to support it. Judge Sprizzo emphatically made this point when Carlon first presented the stigma theory during the post-trial argument of the *Noerr* issue. (*See* App. 29a-30a, 31a-32a.)[10]

The point is significant. Once the stigma misconception is eliminated, Carlon's injury is seen to flow from what the legislatures did or did not do. That is, either Allied's action was causally related to the legislatively enacted exclusion Carlon suffered—the only harm Carlon suffered—in which case *Noerr* and *Parker v. Brown* exempt it, or it was not so related, in which case Carlon had no claim at all.

4. The decision will have widespread and profound impact, chilling useful and desirable code-making activity

The result of imposing liability in circumstances like the ones in this case must be to limit debate within code-making bodies. Few will want to participate if they can suffer antitrust liability even though they act within the code-making group's rules and regulations, the rules and regulations are lawful and the complaining party is not deprived of full and effective access to the code-making process. Few firms will want to risk antitrust exposure for getting into the trenches to promote their view, no matter how well based, that another's product is unsafe or untested or is otherwise hazardous. *See, e.g.*, Wachtel, *Products Standards and Certification Programs*, 13 Antitrust Bull. 1, 3 (1968) (pointing out that potential antitrust liability deters businessmen from participating in desirable industry-wide consumer protection activity).

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10 Judge Sprizzo called the argument a "distortion" (A. 2045) of what was presented to the jury and stated: "I think your theory of damages all along was that your damages flowed from the fact that you were not approved and therefore not adopted by the state legislatures involved." (A. 2046.)

The potential harm to the public interest is substantial. The NEC is one of some 32,000 codes and standards promulgated by over 420 private organizations.[11] The NFPA itself promulgates 260 separate codes and standards relating to fire safety and fire protection.[12]

As the Federal Trade Commission and Department of Justice noted in their brief as *amici curiae* in the Court of Appeals outlining the importance of this case, "[c]odes and standards promulgated by organizations like NFPA influence the policies of numerous states and cities." (Brief at 6.) Industry relies heavily on these standards and codes; state and local governments enact them, particularly the NEC; and government regulations incorporate many by reference.[13] In preparing these codes and standards, model code groups perform a vital, beneficial public service. *See, e.g.*, House Select Comm. on Small Business, *The Effect Upon Small Business of Voluntary Industrial Standards*, H.R. Rep. No. 1981, 90th Cong., 2d Sess. 3, 75 (1968). They provide technical expertise unavailable at most government agencies or within state or local governments. And they supply "real world experience" that government employees may lack. *See* Hamilton, *supra*, at 1377-78 & n.11. State and local legislatures depend on the thorough ventilation of issues within the NFPA and other code-making groups, and they depend on just such interested parties as Allied (and Carlon) to present their views at the NFPA or in other public forums.

In effect, the NFPA and other code-making associations become the legislature's committee rooms and scientific labo-

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11 *See*, National Bureau of Standards, Special Pub. No. 681, *Standards Activities of Organizations in the United States* 1 (Aug. 1984).

12 *Id.* at 2; *see* Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 Tex. L. Rev. 1329, 1339 (1978).

13 *See, e.g.*, 29 C.F.R. § 1910.66(c)(22)(i) (1986); 33 C.F.R. § 183.435(a)(1) (1986); 42 C.F.R. § 52b.11(b)(3) (1986); 42 C.F.R. § 57.112 app. A, para. (e) (1986); 46 C.F.R. § 63.05-85(b) (1986); and 49 C.F.R. § 192.163(e) (1986) (all incorporating the NEC by reference).

ratories. Within those organizations the scientific and technical data are developed and analyzed, the sources of information come together, the debate is joined, and the process of advocacy and persuasion is most intense. That is where the flow of information must be freest. That is where participants need the greatest elbow room—freedom to lock horns, to err, on occasion to use overly robust tactics without facing treble-damage antitrust liability. In *Noerr*, this Court recognized the need for such latitude to enable interested parties to participate freely in the legislative process, even to the point of excess. *See* 365 U.S. at 139.[14]

The constricting or inhibition of model code-making activity will also have broad ripple effects. Smaller jurisdictions do not have the staff or funds to develop their own codes. Larger jurisdictions will have to divert resources from other vital services if they do not get the benefits of model code-making activity. *See* Wachtel, *supra*, at 7. Impairment of the effectiveness of model code organizations may well lead to the chaos of different codes in each jurisdiction, greatly increasing the risk that unsafe products or building activities will be approved or overlooked.

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14 As the Supreme Court recently reminded us, our form of government is predicated on the pluralistic belief that the people will act according to their own self-interest and that "the summation of these individual pursuits will further the collective welfare." In this day of interest-group politics, it is essential that the right to petition to the legislative, executive, administrative, and judicial arms of the government be zealously safeguarded.

Handler & DeSevo, *The Noerr Doctrine and Its Sham Exception*, 6 Cardozo L. Rev. 1, 55 (1984) (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A

Opinion of the United States Court of Appeals for the Second Circuit

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 534, 735—August Term, 1986

(Argued: January 20, 1987 Decided: April 22, 1987)

Docket Nos. 86-7734, -7758

INDIAN HEAD, INC.,

Plaintiff-Appellant, Cross-Appellee,

— against —

ALLIED TUBE & CONDUIT CORPORATION,

Defendant-Appellee, Cross-Appellant.

Before:

LUMBARD, KEARSE, and PRATT,

Circuit Judges.

Indian Head, Inc. appeals from a judgment notwithstanding a jury verdict, entered in the Southern District

by Judge John E. Sprizzo, holding that defendant Allied Tube & Conduit Corp.'s attempts to influence a private standard-setting organization were protected from antitrust scrutiny under the *Noerr-Pennington* doctrine. Allied cross-appeals, arguing that, as a matter of law, its behavior did not constitute a violation of the antitrust laws.

Judgment n.o.v. vacated and remanded with directions to reinstate the jury's award.

FREDRIC W. YERMAN, New York, N.Y. (Kaye, Scholer, Fierman, Hays & Handler, New York, N.Y., Michael Malina, Ira S. Sacks, Richard A. De Sevo, Bert L. Slonim, Donna M. Gerber, of counsel), for Plaintiff-Appellant Indian Head, Inc.

FRANK H. WRIGHT, New York, N.Y. (Grand & Ostrow, New York, N.Y., Allison Manning, Michael D. Rips; Lison & Barrett, Chicago, Illinois, John M. Lison, of counsel), for Defendant-Appellee Allied Tube & Conduit Corporation.

ROBERT D. PAUL, General Counsel, Federal Trade Commission, Washington, D.C. (Ernest J. Isenstadt, Assistant General Counsel, Dean C. Graybill, Michael Goldenberg, Attorneys, Federal Trade Commission, Washington, D.C., of counsel), as Amicus Curiae.

DOUGLAS H. GINSBURG, Assistant Attorney General, Department of Justice, Washington, D.C. (W. Stephen Cannon, Deputy Assistant Attorney General, Catherine G. O'Sullivan, Marion L. Jetton, Attorneys, Department of Justice, Washington, D.C., of counsel), as Amicus Curiae.

LUMBARD, *Circuit Judge*:

This case requires us to decide whether federal antitrust laws apply to attempts to influence the promulgation of a code of safety standards by private industry. In its complaint, plaintiff Indian Head, Inc. (Carlon) charged that defendant Allied Tube & Conduit Corp. had conspired to prevent inclusion of Carlon's product in industry standards. The jury found for Carlon, and awarded it $3.8 million in damages (before trebling). Carlon now appeals from a judgment for defendant, notwithstanding the jury verdict, entered by Judge John E. Sprizzo in the Southern District on July 31, 1986. Judge Sprizzo reasoned that the doctrine developed in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.8. 127 (1961), and *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), which protects petitioning of the government from Sherman Act scrutiny, also protects attempts to influence a private standard-setting organization where, as here, governments routinely incorporate that organization's standards into their legal codes. Allied cross-appeals, claiming that, as a matter of law, its conduct did not constitute an unreasonable restraint of trade. We vacate the judgment n.o.v. and remand with directions to reinstate the jury's award.

I.

The evidence presented to the district court established the following: Carlon, a division of Indian Head, Inc.,

manufactures and sells flexible plastic electrical conduit made from polyvinyl chloride (PVC). Electrical conduit is hollow tubing used in building construction to carry insulated electrical wires through floors, walls, and ceilings, and outside buildings, and to protect the wires from damage or abuse. Carlon's product competes in the marketplace against steel conduit, of which Allied is the largest producer in the United States. Carlon claims that PVC conduit has a number of significant competitive advantages over steel conduit, including its pliability, its lower installed cost, and its lower susceptibility to short circuiting. On the other hand, as the district court instructed the jury, "there is a scientific basis for a concern about safety of PVC products with respect to toxicity. . . . the parties do not dispute that people disagree on the issue and there is an objective basis for a concern for safety." Allied particularly stresses the fact that, during fires in high-rise structures, PVC conduit may burn, emitting toxic smoke and fumes.

This case arises from Allied's efforts to block Carlon's proposal to include PVC conduit as a permissible type of electrical conduit in the 1981 edition of the National Electrical Code (NEC)—a model code, promulgated by the National Fire Protection Association (NFPA), which establishes product and performance requirements for electrical systems, including electrical conduit. The parties agree that NEC is the most widely disseminated and adopted model code in the world. The parties agree further that a substantial number of state and local governments adopt the NEC as law in whole or in part.[1]

[1]A survey, conducted by Allied and submitted to the district court in the Post-Trial Affidavit of John Lison, Allied's Vice President and General Counsel, shows the extent of the governmental reliance upon the NEC as of June, 1982: Of the 51 jurisdictions surveyed (50 states and the District of Columbia), 26 adopted the NEC through the process of incorporation by reference, without changing a word; an additional 19 adopted the NEC with amendments; those jurisdictions which amended the NEC before adopting it on average changed only 12 of its 114 articles; none of the remaining six adopted their own electrical code. Allied's survey also included all cities over 100,000 and a select group of 450 cities whose population exceeded 25,000. 495 cities responded, all with their own electrical code: 232 cities adopted the NEC exactly as written; 256 cities adopted the NEC and made amendments to it, on average changing only 11 articles.

Every three years, the NFPA—a private, voluntary organization composed of over 31,500 individual and group members representing industry, labor, academia, insurance, organized medicine, firefighters, and government—revises the NEC through a multi-step, several-year-long process. The NFPA first submits proposed amendments to the NEC to a Code-Making Panel (CMP) made up of professionals with technical expertise in the area. In order to prevent domination by special interests, no more than one-third of any CMP's membership may represent a single interest. If approved by the CMP, a proposal then goes to the full membership, together with the comments and voting position of each CMP member. After the membership has had an opportunity to comment on the proposal, the CMP considers it a second time, along with the membership's comments. If again approved, the NFPA publishes the proposed amendment to the full membership. The entire membership then votes.

In 1980, when Carlon's proposal was being considered, a simple majority of those present at the annual meeting was sufficient to approve or reject a proposal. Disappointed members can appeal the membership's vote to NFPA's Standards Council and ultimately to its Board of Directors. Finally, NFPA rules also permit *de novo* review

of a defeated proposal by the CMP, the Standards Council, and the Board of Directors, in a procedure known as a Tentative Interim Amendment (TIA). If adopted, a TIA includes or excludes a proposal on an interim basis until the next code cycle.

On September 18, 1978, Carlon began the process of obtaining NEC approval for PVC conduit by submitting its proposal, known as Article 331, to the NFPA, along with a fact-finding report by the Underwriters Laboratories. The NFPA directed the proposal to CMP-8, which initially rejected it. However, in December, 1979, based on further fact finding and field demonstrations by Carlon, CMP-8 reversed its earlier decision and approved Article 331 for review by the full membership. The NFPA then scheduled the article for consideration by the full membership at the next annual meeting, to be held in Boston in May, 1980.

Recognizing that inclusion of PVC conduit in the NEC might adversely affect its sales of steel conduit, Allied's representatives met with a number of different groups, including other members of the steel industry, to gather votes in opposition to Article 331. On January 30, 1980, the Steel Rigid Conduit and Electrical Section of the National Electrical Manufacturers Association (NEMA) held a meeting to discuss the matter. At that meeting, and at a full meeting of the NEMA Steel Section held in February, everyone agreed to bring as many voters as possible to the upcoming NFPA meeting; Allied itself pledged to bring at least 100 people to vote against Article 331. Additional meetings and communications were held among the steel interests to coordinate their efforts to block Article 331's adoption. Acting within the letter of NFPA rules, Allied eventually arranged for 155 persons—including

employees, sales agents, the agents' employees, company executives, employees of two of Allied's divisions, and the wife of the national sales director—to join the NFPA, to register as voting members, and to attend the annual meeting to vote against the proposal. Allied also paid over $100,000 for the membership, registration, and attendance expenses of these voters. The other steel interests similarly recruited and paid for the expenses of voters at the May, 1980 meeting. In total, the steel interests gathered 230 votes.

Carlon made no attempt to sign up additional employees or sales agents other than the four already scheduled to attend the meeting. Until about April 18, 1980, H.F. van der Voort, who coordinated Carlon's efforts to amend the NEC, apparently believed that the NFPA's rules did not permit a motion from the floor to return Article 331 to CMP-8. On or about April 18, van der Voort discovered that such a motion could, in fact, be made. By this time, Carlon could not have signed up additional members to vote at the May meeting; under NFPA rules, only those who have been NFPA members for at least 30 days could vote at an annual meeting. However, Carlon did solicit support from members of the Society of Plastics Industry, the NEMA plastics section, other members of the plastics industry, NFPA's railroad and health care sections, and the Fire Marshals Association of North America.

At the annual meeting, Allied instructed its personnel where to sit, based upon a detailed seating chart, and appointed group leaders to instruct the voters "how the discussion is progressing and how to vote." Boxed lunches were provided and the voters were told to "stay nailed to their seats" until the end of two evening sessions. Group

leaders used walkie-talkies and hand signals to facilitate communication. Few of Allied's voters had any of the technical documentation necessary to follow the meeting; nor did any of them speak in opposition to Article 331 in the course of the meeting.

Two votes were taken on the motion to return Article 331 to CMP-8. The first, a voice vote, was inconclusive. The second, a standing vote, approved the motion by a vote of 394-390. To insure its victory, Allied insisted that its representatives remain in their seats until 2:00 a.m., when the NFPA membership voted to approve the entire NEC, without Article 331. Carlon immediately appealed the decision of the membership to the Standards Council, which referred the appeal to the Board of Directors. Finding that the NFPA rules had been circumvented but not violated, the Board denied the appeal, and returned Article 331 to the CMP-8. In June, 1980, Carlon applied for a TIA including Article 331 in the 1981 NEC. After the proposed TIA wound its way through the various levels of the code-making process, encountering opposition by Allied at each step, a subcommittee of the Board of Directors found that Carlon's request was not sufficiently exigent to warrant issuance of the TIA.

Carlon commenced this action against Allied and the NFPA on October 9, 1981, alleging that they, the American Iron & Steel Institute, other steel conduit manufacturers, and Allied's independent sales agents had "combined and conspired to prevent competition from non-metallic tubing by excluding it from the 1981 NEC" by "subverting the consensual standards rules and procedures of the NFPA."[2] After extensive pretrial proceedings,

[2]Prior to trial, Carlon discontinued with prejudice its action against the NFPA.

a bifurcated trial commenced on March 4, 1985 before Hon. John E. Sprizzo and a jury. Prior to the submission of the liability issues to the jury, Allied conceded that it had a pecuniary or commercial interest in seeing that PVC conduit was not included in the NEC; Allied also admitted that it had agreed with the other steel companies to oppose Article 331.

After four days of deliberation, the jury returned its verdict and also answered specific interrogatories submitted by the court. The jury found that Allied's conduct subverted the consensus standard-making process of the NFPA, and constituted an unreasonable restraint of trade in violation of the antitrust laws. Judge Sprizzo then charged the jury on Carlon's theory that it was injured by the stigma of its exclusion from the 1981 NEC and Allied's marketing of that exclusion.[3] Relying upon these instructions, the jury found that "as a proximate result of Allied's unreasonable restraint of trade in violation of the antitrust laws," Carlon lost $3.8 million in profits.

Following the trial, Allied moved for a judgment n.o.v., or, alternatively, for a new trial. Allied claimed that the *Noerr-Pennington* doctrine and the first amendment barred entry of judgment in Carlon's favor and attacked on various grounds the court's charge and the jury's findings. Judge Sprizzo rejected the charge and jury findings

[3]Carlon alleged that the stigma of not obtaining NEC approval of its product and Allied's "marketing" of that stigma caused independent marketplace harm to Carlon in those jurisdictions permitting use of PVC conduit, as well as those which later adopted the 1984 NEC, which permitted use of PVC conduit in buildings less than three stories high. It did not seek redress for any injury arising from the adoption of the NEC by the various governments. *See Parker v. Brown*, 317 U.S. 341 (1943) (state action doctrine). The district court instructed the jury accordingly. Allied does not challenge the correctness of, or the foundation for, the jury's computation of the damage resulting from that stigma.

challenges but held that the *Noerr-Pennington* doctrine required that the jury's verdict be set aside.

II.

The *Noerr-Pennington* doctrine originated in a trilogy of Supreme Court cases. The Court first focused upon the tension between the first amendment and the Sherman Act in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961). As part of an "economic life or death" struggle between the railroads and the emerging trucking industry over control of the long distance freight hauling market, the railroads began a deceptive publicity campaign designed to destroy the truckers' goodwill among their customers and the general public, and to advocate legislation that would hamper the trucking industry's ability to compete against the railroads. In a unanimous opinion authored by Justice Black, the Court reversed the judgment for the truckers, holding that Congress had not intended the Sherman Act to apply to "activities compris[ing] mere solicitation of governmental action with respect to the passage and enforcement of laws." *Id.* at 138.

While noting the "essential dissimilarity" between joint efforts to seek legislation and "agreements traditionally condemned by § 1 of the Act," *id.* at 136, the Court primarily feared that an expansive construction of the Act "would raise important constitutional questions" regarding the right to petition the government guaranteed by the first amendment. *Id.* at 138. The Court refused to "lightly impute to Congress an intent to invade these freedoms," *id.*, especially because the legislative history of the Act provided no basis for concluding that the purpose of the Act was "to regulate, not business activity, but political activity . . . ." *Id.* at 137. Notwithstanding, the Court cautioned: "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." *Id.* at 144.

In *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), the Supreme Court extended *Noerr's* exculpatory principles to attempts to influence the executive branch; the Court held that *Noerr* protected the efforts of large mine owners and union officials to squeeze out smaller coal producers by persuading the Secretary of Labor to raise minimum wage levels. Justice White stated that, "[j]oint efforts to influence public officials do not violate the antitrust laws even though intended to eliminate competition. Such conduct is not illegal, either standing alone or as part of a broader scheme itself violative of the Sherman Act." *Id.* at 670.

The last of the trilogy, *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972), made three important contributions to the development of the doctrine: First, the Court applied *Noerr* to administrative and adjudicative proceedings. Second, it provided the Supreme Court's first application of the "sham" exception foreshadowed in *Noerr*: The Court held that a group of trucking companies' opposition to each and every license application made by their competitors "'with or without probable cause, and regardless of the merits of the cases,'" did not deserve *Noerr-Pennington* immunity. Finally, in so holding, *California Motor Transport* made clear that the *Noerr-Pennington* doctrine rested squarely upon the first amendment rights of petition and association. *Id.* at 510-12.

Noting that "the decision of the NFPA will be largely determinative of what the legislatures do," the district court concluded that there was "an intent to influence legislative action through the NFPA in this case, which is protected by *Noerr-Pennington*." Three previous district court decisions have reached similar conclusions. *Sessions Tank Lines, Inc. v. Joor Manufacturing, Inc.*, 1986-1 Trade Case (CCH) ¶ 66,989 (C.D. Cal. 1986) (Western Fire Chiefs Association), *appeal docketed*, No. 86-6208 (9th Cir.); *Wheeling-Pittsburgh Steel Corp. v. Allied Tube & Conduit Corp.*, 573 F. Supp. 833 (N.D. Ill. 1983) (NFPA); *Rush-Hampton Industries v. Home Ventilating Institute*, 419 F. Supp. 19 (M.D. Fla. 1976) (Southern Building Code Congress; International Conference of Building Officials; Building Officials and Code Administration International). These decisions rely upon two intertwined yet separable strands of argument: First, because state and local governments routinely enact the NEC into law, the NFPA takes on a "quasi-legislative" nature. Therefore, the argument goes, under *Noerr-Pennington*, attempts to influence the NFPA may be equated with attempts to influence the government. Second, because the NEC forms the basis for a substantial number of governmental codes, Allied's conduct should be construed as an indirect petition to state and local governments. As we conclude that Allied's "ballot stuffing"—a subversion of the NFPA code-making process—should not be deemed governmental petitioning, we find neither of these arguments persuasive.

A.

We decline Allied's invitation to extend *Noerr-Pennington* immunity to lobbying activities directed toward a "quasi-legislative" body such as the NFPA.[4]

[4]Allied has stipulated that the NFPA is a "private, *non-governmental* organization." (emphasis added). Moreover, Allied has made no claim of any official delegation of governmental power to the NFPA. Thus, the NFPA's alleged "quasi-legislative" status results solely from the *de facto* "delegation" of law-making authority evinced by the extent of the reliance of the various governments upon the NEC.

First, the policies which underlie the doctrine do not warrant such an extension. *Noerr's* holding depended upon the unique nature of petitions directed to the government in our political system: Justice Black focused upon the "right of the people to inform their representatives in government of their desires with respect to the passage or enforcement of laws . . . ." 365 U.S. at 139. He explained that, "[i]n a representative democracy such as this, . . . government act[s] on behalf of the people and, to a very large extent, the whole concept of representation depends upon the ability of the people to make their wishes known to their representatives." *Id.* at 137. The Court feared that applying the Sherman Act to "disqualify people from taking a public position on matters in which they are financially interested" could "deprive the government of a valuable source of information and, at the same time, deprive the people of their right to petition in the very instances in which that right may be of the most importance to them." *Id.* at 139. Moreover, "such a holding would substantially impair the power of government to take actions through its legislature and executive that operate to restrain trade." *Id.* at 137.

These concerns do not apply with equal force to private organizations. Ideally, a legislature acts in the public interest. If it fails to do so, its members must answer to the constituents they represent. We must therefore allow an unrestricted flow of information to the government to ensure a complete consideration of the issues, secure in the reasonable expectation that our representatives will

act in the public interest. No similar safeguards exist to prevent a private organization from adopting policies contrary to the interests of the general public—in the instant case, establishing an anticompetitive restraint of trade. *See American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982) (standard-setting organizations may "be rife with opportunities for anticompetitive behavior"); *see generally* Hurwitz, *Governmental Process, the First Amendment, and the Boundaries of* Noerr, 74 Geo. L.J. 65, 90-93 (1985).

As the Supreme Court stated in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45 (1985), "[w]e may presume, absent a showing to the contrary, that [a government] acts in the public interest. A private party, on the other hand, may be presumed to be acting primarily on his or its own behalf." *See also Hydrolevel, supra*, 456 U.S. at 571 ("Although, undoubtedly, most serve [private standard-setting organizations] without concern for the interests of their corporate employers, some may well view their position . . ., at least in part, as an opportunity to benefit their employers."). A private organization's agenda often will not coincide with, and may be directly contrary to, the interests of the broader public. Neither the organization, its membership, nor its leadership is checked by any accountability to the general public. Moreover, even if the organization attempts to act in accordance with its conception of the public interest, that conception is necessarily colored by the composition of its membership. *See* Hamilton, *The Role of Nongovernmental Standards in the Development of Mandatory Federal Standards Affecting Safety or Health*, 56 Tex. L. Rev. 1329, 1380-86 (1978) (private standard-setting organizations may not provide "sufficient participation by consumers, workers, and small business," and may not give

"adequate consideration" to "certain noneconomic interests in developing a consensus when most of the participants are representatives of economic interests").

Our concern that these organizations might operate contrary to the public interest becomes particularly acute in view of their importance within the economy. A private standard-setting organization "wields great power in the Nation's economy." *Hydrolevel, supra*, 456 U.S. at 570. The standards it develops and their interpretations "'may result in economic prosperity or economic failure, for a number of businesses of all sizes throughout the country,' as well as entire segments of an industry." *Id.*, quoting H.R. Rep. No. 1981, 90th Cong., 2d Sess., 75 (1968).

Second, extending *Noerr-Pennington* to such "quasi-legislative" bodies would raise serious practical problems: How many and which governmental bodies must enact a code before the organization takes on a quasi-legislative nature? To what extent does a code have to be enacted? If the governmental bodies decide to amend a code before adopting it, how extensive can the changes be before the members of the organizations lose *Noerr-Pennington* protection? The difficulty of answering such questions underscores the differences between petitioning a governmental body and lobbying a private organization.

Thus, we find Judge Wisdom's opinion in *Feminist Women's Health Center, Inc. v. Mohammad*, 586 F.2d 530 (5th Cir. 1978), *cert. denied*, 444 U.S. 924 (1979), to be persuasive authority. In *Mohammad*, an abortion clinic claimed that members of a nearby hospital's OB-GYN staff had conspired to restrain trade in the abortion market in the Tallahassee area. The defendant physi-

cians had communicated their concerns about the ethics of some of the clinic's practices to a private organization of area physicians, to the Executive Director of the Florida Board of Medical Examiners (BOME), and to the head of residency at another hospital. At the same time, the physicians discussed their concerns amongst themselves. The district court granted summary judgment to the doctors, holding that the communications and discussions were protected under *Noerr-Pennington*.

The Fifth Circuit disagreed. The court distinguished between the communications addressed to the BOME, "a creature of state law," *id.* at 542, and the other communications. The former were "a form of activity . . . protected by the *Noerr-Pennington* doctrine absent proof of sham." *Id.* However, this protection did not extend to the other communications, even though state statutes vested the recipient organizations "with a kind of quasi-legislative authority." *Id.* at 545. State statutes permitted the BOME to take action against physicians disciplined by private medical groups, but did not require that it do so. Therefore, Judge Wisdom concluded, "[h]ospital medical staffs and medical societies play an important role in Florida's regulatory scheme, but that role is not a governmental one." *Id.* (footnotes omitted).

We believe that *Mohammad* has application here. State and local governments are no more required to enact the NEC into law than the BOME was required to act upon the conclusions of the private disciplinary groups in *Mohammad*. The fact that governments usually do accept the recommendations embodied in the NEC does not transform the NFPA into a governmental organ; consequently, attempts to influence the NFPA, a private organization, cannot claim *Noerr-Pennington* protection. *See*

also United States v. Johns-Manville Corp., 259 F. Supp. 440, 452-54 (E.D. Pa. 1966) (recognizing that activities designed "to influence the decision of public officials" are protected under *Noerr-Pennington*, but refusing to grant summary judgment dismissing claims that defendant conspired to bring about the adoption of anticompetitive pipe specifications by two private organizations).

B.

We also reject Judge Sprizzo's conclusion that Allied's "intent to influence legislative action through the NFPA" brought its activities within the bounds of *Noerr-Pennington*. Allied's behavior, which itself caused independent antitrust injury to Carlon, should not be excused merely because its actions also indirectly influenced state and local governments. Simply put, Allied's conduct did not constitute petitioning of the government within the meaning of *Noerr-Pennington*; rather, its conduct was a subversion of the legitimate purposes of the NFPA.

First, in deciding whether group action falls within the bounds of *Noerr-Pennington*, several courts of appeals have drawn a distinction between the submission of a group's recommendations to the government and the antecedent conduct which generated those recommendations. In *Mohammad, supra*, the Fifth Circuit distinguished between the actions of medical review committees in "reporting disciplinary findings and suspected violations to the BOME [which] may be petitioning activity within the meaning of the first amendment," and "communications within those groups[, which] are not." 586 F.2d at 545. Similarly, in *Litton Systems, Inc. v. American Telephone & Telegraph Co.*, 700 F.2d 785 (2d Cir. 1983), we refused to grant *Noerr-Pennington* protection to a conspiracy to establish an anticompetitive

tariff merely because the tariff was eventually filed with the FCC. We noted that "[t]he decision to impose and maintain the interface tariff was made in the AT&T boardroom, not at the FCC." *Id.* at 807. The fact that the FCC "might ultimately set aside" the tariff did "not transform AT&T's independent decision . . . into a 'request' for governmental action or an 'expression' of political opinion." *Id.* (footnote omitted). *See also United States v. Southern Motor Carriers Rate Conference, Inc.*, 702 F.2d 532, 542 (5th Cir. 1983) (*Noerr* does not protect collective action by common carriers to establish anticompetitive rates which are eventually submitted to the state regulatory commission, but does protect the submission of those rates), *aff'g en banc*, 672 F.2d 469 (5th Cir. 1982), *rev'd on other grounds*, 471 U.S. 48 (1985). These decisions control the instant case.

Second, the district court's application of the *Noerr-Pennington* doctrine contravenes the maxim that "exemptions from the antitrust laws must be construed narrowly." *Union Labor Life Insurance Co. v. Pireno*, 458 U.S. 119, 126 (1982). The policies behind the *Noerr-Pennington* doctrine—protecting the right to petition the government and insuring an uninhibited flow of information to governmental representatives—do not require that Allied's anticompetitive behavior be ignored. Allied might have made its views known, and provided all the information it deemed relevant, by directly petitioning state and local governments at the adoption stage.

Nor are we swayed by Allied's contention that, because of the heavy reliance placed upon the NEC by various governments, the only effective method of influencing these governments is through the NEC amendment process. Allied's own survey shows that over half the states

and cities polled either amended the NEC before adopting it or refused to adopt it at all. As the district court acknowledged, "there is obviously an opportunity to change the mind of the legislature and . . . there is an opportunity for the defendant and the plaintiff to lobby at that level . . . ."

Allied finally argues that a refusal to accord its behavior *Noerr-Pennington* protection would be inconsistent with the Supreme Court's grant of that protection to the railroad's publicity campaign in *Noerr*. *See also Federal Prescription Service v. American Pharmaceutical Association*, 471 F. Supp. 126, 130 (D.D.C. 1979) (efforts to solicit support in a campaign to induce governmental action "were at least indirect attempts to influence governmental behavior" deserving protection), *aff'd*, 663 F.2d 253, 262 n.6 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 928 (1982). That holding, Allied contends, authoritatively abolishes any distinction between "direct" and "indirect" petitioning. However, in *Noerr*, the Court held that the railroad's publicity campaign did not violate the antitrust laws because "a publicity campaign to influence governmental action falls clearly into the category of political activity" to which the Sherman Act does not apply. 365 U.S. at 140-41. Congress, the Court concluded, had not intended the Sherman Act to have "application in the political arena" as "Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities . . . ." *Id.* at 141. Allied cannot similarly claim that its conduct constituted "political activity" conducted within the "political arena."

III.

On cross-appeal, Allied claims that, as a matter of law, its conduct did not constitute an unreasonable restraint of

trade.[5] First, Allied argues that an industry participant in a private standard-setting organization should not be held liable under the antitrust laws where a genuine safety concern at least partially motivates its involvement in the process; the organization's rules prevent domination by commercial interests and accord due process to the participants; and objective scientific evidence supports the resulting standard. *Cf. Hydrolevel, supra,* 456 U.S. at 577 ("And in this case, we do not face a challenge to a good-faith interpretation of [a private] code reasonably supported by health or safety considerations."). Allied points out that the fear of treble damages and judicial second-guessing might chill participation by financially interested industry members, who have an incentive to undertake the costly process of generating and gathering costly safety information. *See, e.g.,* M. Olsen, *The Logic of Collective Action: Public Goods and the Theory of Groups* (1971) at 14-16. Moreover, while judges are specialists in procedural fairness, they will often have little expertise in the substantive area to which a standard applies. *Cf., e.g., Kletschka v. Driver,* 411 F.2d 436, 443 (2d Cir. 1969) (The infeasibility of reviewing every decision and the lack of technical expertise in the substantive area means that "the courts should seek to discourage arbitrary agency action by enforcing the various procedural rights . . . and not by

[5]As part of its cross-appeal, Allied also urges that the district court improperly submitted a separate special jury interrogatory asking whether Allied's opposition to Article 331 constituted the "least restrictive means" of expressing opposition to PVC conduit. Carlon argued to the court that the answer was potentially dispositive. Even though Judge Sprizzo disagreed with Carlon's legal theory, he did not abuse his discretion by submitting the question to the jury in order to avoid the possibility of a retrial, *see Litton Systems, supra,* 700 F.2d at 803 & n.19, particularly because he made clear to the jury that the existence of less restrictive means "was not dispositive" of and was only "tangentially related" to Carlon's antitrust claim.

undertaking a full substantive review of the justification for the decision.").

However, in this case, Allied violated the integrity of the NFPA's procedures. The jury found that, although Allied acted within the letter of the NFPA's rules, its conduct "subverted" the code making process which Allied admits contained an inherent "potential for abuse." The record substantiates this conclusion: the steel interest's recruitment of the 230 members for a single vote gave it a disproportionate voice, inconsistent with the concept of "consensus" standard making; few of Allied's recruits had the knowledge or inclination to make an independent decision on the merits of the issue; the industry reacted negatively to what the trade magazines termed the conversion of NFPA's "code-making process . . . into a battleground for establishing commercial preference for competing product types;" on Carlon's appeal, the NFPA Board of Directors found that Allied had "circumvented" NFPA rules; Jack Sanders, chairman of an NFPA committee formed to review its voting procedures after the May, 1980 meeting, testified that Allied's actions were inconsistent with the intent of those procedures; following, and as a direct result of, Allied's conduct, the NFPA amended its rules to prevent a recurrence of the PVC conduit vote; finally, Judge Sprizzo sustained the jury's verdict against Allied's challenges. In short, Allied packed the annual meeting with newly registered members, whom it subsidized, for the sole purpose of achieving an anticompetitive result—the exclusion of PVC conduit from the marketplace. We refuse to permit a defendant to use its literal compliance with a standard-setting organization's rules as a shield to protect such conduct from antitrust liability.

Nor do we find any merit in Allied's claim that it should not be held liable under the antitrust laws because the exclusion of PVC conduit from the 1981 NEC was supported by objective scientific evidence. The "objective validity" of a restraint has never been a defense to an antitrust charge, cf. *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927) (reasonableness of price is not a defense to a price fixing charge).

IV.

The judgment of the district court is vacated and remanded with directions to reinstate the jury's award.

APPENDIX B

Opinion of the United States District Court for the Southern District of New York

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Civ. 6250

INDIAN HEAD, INC.,

Plaintiff,

—against—

ALLIED TUBE & CONDUIT CORP., etc.,

Defendant.

New York, N. Y.
June 27, 1986
11:50 a.m.

Before:

HON. JOHN E. SPRIZZO,

District Judge.

APPEARANCES:

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER
Attorneys for Plaintiff
BY: FREDRIC W. YERMAN, Esq.
IRA S. SACKS, Esq.

GRAND & OSTROW
Attorneys for Defendant
BY: FRANK WRIGHT, Esq.
ALLISON MANNING, Esq.

THE COURT: As I have indicated, I am prepared to rule from the bench. The following will constitute the Court's opinion, which, subject to editorial changes which may be made when I receive the transcript, will constitute the opinion and order of the Court.

I should make it clear at the outset that I have reviewed the briefs and considered all the arguments made by the defendant to justify setting aside the verdict in this case. I do not find

them, as I have indicated, meritorious. I think the Court's charge with respect to the rule-of-reason analysis was in all respects correct. I think the defendant has distorted that charge by their emphasis on the least-restrictive-means question which was put to the jury. I think the Court made it very clear that was a factor for the jury to consider and was not dispositive.

The Court is not satisfied that there was any inconsistency in the jury's answers to the questions, because the Court is satisfied that you could subvert the spirit of the NFPA rules while at the same time complying with the letter of those rules, as indeed the appeal of this case to the NFPA Appeals Council tends to show.

I also find that the fact that you have an effective appeal does not in any way detract from the jury's finding that the conduct in which the parties engaged had the impact of subverting what the consensus-making standards of the NFPA were designed to do in the first place. It may very well be that when something takes place at the lower level of a proceeding, that impacts to some extent the appeal, even if the appeal would otherwise be an effective appeal and even if the ultimate decision is made by an appellate court. Obviously, things may happen at the trial which for one reason or another an appellate court may not feel that they should change in view of the fact that they were resolved in the lower court. I think the same thing applies here. There may be an effective appeal to the Appeals Council and at the same time conduct which may limit what scope the Appeals Council should choose to give. There is an argument made here that is what happened. There were arguments made to the jury on that question. I am not satisfied as a matter of law that any of that requires the setting aside of the jury verdict. I also might add parenthetically that I am not satisfied that there was no evidence to support the jury's finding with respect to the least-restrictive-means question as to whether they could or could not have suggested a three-story limitation earlier.

I think there is factual support for the jury's verdict. All of those claims are therefore rejected.

The only issue which is raised by the motion for a directed verdict which requires that the verdict be set aside is the applicability of the Noerr-Pennington doctrine to the facts of this case.

The Court starts, as it must, with the Noerr-Pennington case itself. Whatever interpretation or gloss the courts have put upon the Noerr-Pennington doctrine, obviously the Court must start with that case itself.

I think it is very plain from the Noerr case that conduct which is outside of or removed from the legislative halls can still be protected under Noerr-Pennington. I think the Noerr case makes that clear. Indeed, the facts of Noerr itself reflect conduct which was directed to the public at large. So the Court finds no basis for the argument made by the plaintiff in this case—and, indeed, the FTC, which filed an amicus curiae brief—that the concept should be limited to direct acts of petitioning the government or government agencies or officials. I think that interpretation is not supported by the facts of the Noerr case. That argument is therefore rejected.

It is also clear from the Noerr case and from the cases which have construed the case, California Transport and the lower-court cases—I can't cite them all, obviously, but they are referred to in the briefs and I don't think there is any need for me to refer to them here—that the Supreme Court has drawn a distinction between the kind of conduct which is permissible at the legislative level or with respect to legislation and that which might be permitted with respect to adjudicatory or judicial bodies and tribunals of that sort. There is a much freer rein of permissible conduct when we are dealing with attempts to influence the legislature than might be permissible if we were dealing with attempts to influence a judicial or adjudicatory tribunal. I think that strain runs through the California Transport case, the Second Circuit has adopted it in the Litton case, and Judge Carter adopted it in a lower court opinion, the name of which escapes me, but which was submitted and referred to in the brief. I think that is clear and can't be questioned.

So we are dealing here with a body which, as plaintiff concedes and defendant concedes, and have conceded throughout this litigation, once they adopt the safety standard, that

standard will almost inescapably be followed by the legislatures of the various states. While there is obviously an opportunity to change the mind of the legislature and while obviously there is an opportunity for the defendant and the plaintiff to lobby at that level, both sides seem to agree and have agreed from the inception of this litigation that the decision of the NFPA will be largely determinative of what the legislatures do.

I think there can't be any doubt, on the facts of this case, that certain things are crystal-clear. There can't be any question that the attempt on the part of Allied to influence the various state legislatures through the NFPA was a genuine attempt to influence legislative action. All of those cases which have found that Noerr-Pennington does not apply involve situations where it was clear that the defendant was not genuinely intending to influence legislative or official action but was merely indulging in a posture or a sham that was designed solely to effectuate their anticompetitive purpose. Here there is no question that defendant genuinely intended to influence legislative action through the NFPA. That was never in dispute. Moreover, the jury has found that Allied had a genuine concern for safety, and plaintiff has conceded that there was a factual basis for that concern.

Given all of those considerations, there is no way the Court can find, in the face of the jury's findings and in the face of the conceded facts of the case, that there was not an intent to influence legislative action through the NFPA in this case, which is protected by Noerr-Pennington. The Court has rejected the plaintiff's argument that merely because it was done one step removed from the legislative process it cannot be protected by Noerr-Pennington.

This leads us to the next step, which is the argument advanced that the kind of conduct which the defendant engaged in was so reprehensible and so outrageous as to require that it be found to be outside the protection of Noerr-Pennington itself. The Court rejects the argument that the conduct which is involved here—which is, for want of a better word, stacking the vote or getting out the vote, depending upon how you choose to characterize it, and the payment of expenses of the NFPA people, not in violation of any rules of

the NFPA—was somehow so outrageous as to be unprotected. The Court finds and has believed throughout this case that that kind of conduct is so much a part of the traditional democratic process at every level of our society, from the local club right through the Congress itself, that the Court cannot find that kind of conduct is so outrageous in and of itself so as to be unprotected.

The plaintiff argues, of course, that an exception to the antitrust laws should be narrowly construed and therefore this conduct should not fall outside those laws. They rely upon a series of cases which say that conduct otherwise illegal doesn't become protected because it has some incidental aspects of speech. As I have indicated during the course of the argument, the Court finds that argument to be circular in nature, because the ultimate question is: Is the conduct illegal? So those cases are not particularly helpful.

I think everyone concedes that Noerr-Pennington, while initially not a constitutionally based case, is predicated upon policy considerations which underlie the First Amendment and our own democratic institutions. And California Transport made it abundantly clear that there is a constitutional predicate for that decision. In short, the Supreme Court has made it clear that it would not interpret the antitrust laws so as to reach conduct which would otherwise be protected under our system. Given that circumstance, we are not really talking about an exception to the antitrust laws but the way in which we should rationally construe those statutes.

The argument was advanced here that Noerr-Pennington should not protect Allied's conduct—it was advanced, I might add, very belatedly in the case—because there are some specific statutes which would prohibit paying Congressional expenses. The Court does not find that argument persuasive or dispositive for the following reasons.

First of all, the rules of the NFPA do not prohibit the payment of expenses. Therefore, the fact that paying Congressional expenses is prohibited does not seem to have much relevance to the question.

Secondly, it is not entirely clear, given the parameters of the Noerr-Pennington doctrine itself, and the way the Supreme Court has construed it, that even if you paid a Congressman's expenses in violation of a Congressional statute itself, that would be unprotected conduct. I think the Noerr-Pennington cases protect deceptive conduct, even fraudulent conduct when addressed to a legislative body like the Congress or other legislative body. I think further that the NFPA, the way it was functioning in this case, was more akin to a legislature than a court, in that it was fixing prospective standards. Therefore, I am not satisfied, and certainly no Supreme Court case has ever held, that paying a Congressman's expenses in violation of federal law would be a violation of the antitrust laws, where, as here, that was done as part of a genuine effort to influence legislative action.

For those two reasons I reject the argument. I think it has very little relevance in the context of the NFPA. As Mr. Wright pointed out in his response, it has logic on its side but not reality, in the sense that nobody did anything illegal in terms of the NFPA rules, and the jury has so found. Indeed, the plaintiff paid the expenses of their people who attended meetings.

With respect to the sham exception, the Court finds absolutely no basis to apply the sham exception to the Noerr-Pennington doctrine. The Court is unaware of, nor has any case been directed to the Court's attention, of any court ever applying the sham exception to Noerr-Pennington in a case where, as here, there was a genuine attempt to influence a legislative body arising out of a genuine concern for safety, and, concededly, a factual basis for that concern.

A word should be said about the argument advanced by the Federal Trade Commission that, since actions of private standard making bodies excluding competitors' products from the market have been found to violate the antitrust laws, Noerr-Pennington should not apply in this case. The FTC asserts that the non-adoption of ENMT had other business consequences, such as an impact upon insurance, which flowed from its rejection, independent of the impact that it had with respect to the electrical codes of the various states. Reliance is placed on

the Radiant Burners case and the Hydrolevel case for the proposition that Noerr-Pennington should not be applied to the action of standard making bodies such as the NFPA.

In the first place, as has been noted, in Hydrolevel the Noerr-Pennington issue was not even raised. Moreover, in that case the plaintiff's damages flowed from a corrupt and surreptitious interpretation of a standard, which was engineered by an official of the standard making body (who was also a vice president of respondent's competitor) and circulated in the marketplace. Quite aside from the fact that the case involved facts more analogous to adjudicatory action, as to which Noerr-Pennington has a more restrictive application, the case did not, as this case does, involve any genuine effort to influence government action; nor did plaintiff's damages flow from any such governmental action. Here, of course, the opposite is true.

Radiant Burners is equally inapposite. In that case there was a concerted refusal to deal with a party whose product failed to meet the standard involved. Thus, concededly illegal conduct was involved, i.e., a group boycott, rather than a genuine attempt to influence legislative action to adopt or not adopt a standard.

Nor is this a case where the devising and filing of a tariff or a request for governmental approval was invoked as a cloak for clearly illegal anticompetitive conduct, such as in the Cantor and Litton cases. Moreover, as has been noted, plaintiff's alleged damages here arise solely from the fact that the rejection of ENMT by the NFPA led to its exclusion from the National Electrical Code, which is adopted by most of the states. This is evident from the complaint, see Complaint at paragraphs 13, 30-32, and from the position consistently maintained by plaintiff throughout this litigation. See, e.g., Trial Transcript, March 5, 1985, at 11-27, 34-37 (Opening Statement of Fredric Yerman, Counsel for Plaintiff—Liability Phase); Trial Transcript, April 2, 1985, at 2072, 2104-05 (Closing Statement of Fredric Yerman—Liability Phase); Trial Transcript, April 11, 1985, at 2301-02 (Opening Statement of Ira Sacks, Counsel for Plaintiff—Damages Phase); Trial Transcript, April 23, 1985, at 3220-24, 3246-50, 3256-57 (Closing

Statement of Ira Sacks—Damages Phase). The plaintiff has withdrawn any claim that the NFPA itself acted improperly or was a party to the alleged conspiracy, and, indeed, has dropped its claim against the NFPA, another circumstance which distinguishes this case from Hydrolevel.

In short, the case presents a situation where Allied, by the use of methods consistent with acceptable standards of political action, genuinely intended to influence the NFPA with respect to the National Electrical Code, and to thereby influence the various state and local legislative bodies which adopt the NEC, by advocating its genuine and adequately based safety concerns in the manner most likely to have an impact on these codes—by voting at the NFPA meeting. That conduct is of the type which Noerr-Pennington is clearly designed to protect, regardless of its anticompetitive purpose or intent. Plaintiff had the same opportunity to advocate its position before the NFPA in the same manner, and was clearly not excluded from that process in any way.

Under these circumstances, and where the alleged violation of the antitrust laws is simply that the defendant was able to produce more votes in its favor than plaintiff was able to muster in opposition, and where plaintiff's damages consist of a diminished share of the market flowing from the failure of ENMT to be included in the 1981 National Electrical Code, the Court is constrained to sustain the Noerr-Pennington defense.

With all due respect to Mr. Yerman, I find the logic and arguments of his senior partner more persuasive on that question. I reviewed the law review article, and I am convinced Professor Handler is quite correct in suggesting that the only thing the courts should look to in deciding whether Noerr-Pennington applies is whether or not there is a genuine intent to influence legislative conduct.

A good argument can be made for the fact that perhaps we should have granted summary judgment here. However, if I recall this case correctly, you were never able to agree upon a set of facts upon which the Court could frame that legal issue. But I think the whole point of Professor Handler's argument is that trials should be avoided in this situation unless there is some question as to whether there was a genuine intent to

influence legislative action. Out of an abundance of caution I had a trial. Being aware, as I am, of the Second Circuit's reluctance to affirm summary judgment, we had a trial. It may very well be that the Second Circuit will agree with Professor Handler that we didn't need one under the facts of this case. But we have had one. The Court tried the issue of whether or not the defendant had a genuine concern for safety. To make it absolutely clear, just in case there was some arguable position here that that might have constituted a sham, that they didn't really believe what they were saying, we have tried that issue and that issue has been resolved by the jury.

I am still not so sure the case was appropriate for summary judgment. It may have been if we accept Professor Handler's analysis. Nevertheless, the parameters of the sham exception to the doctrine are so unclear that I was not confident that the Second Circuit would affirm a grant of summary judgment on that issue, even assuming I was given an agreed statement of facts—which was not given, as I recall, although we made a lot of efforts in that direction.

I will respond at least to the suggestion made in Mr. Yerman's argument that somehow or other he retreated from or abandoned his position with respect to his claim that the damages in this case flowed from legislative action. I reviewed my charge and I reviewed the transcript. There is no basis for that argument. I find that argument untenable.

I think what happened at the trial—and I have refreshed my memory from the transcript—was that because of the question put to the jury with respect to least restrictive means, the portion of the charge referred to had to do with the fact that plaintiff would compute damages on the basis of the three-story limitation having been adopted in 1980. Later on in the charge, the Court pointed out to the jury that no damages were being claimed in terms of the damage phase of the trial from any conduct of public lobbying or lobbying of the legislatures. That had to do with mere computation of damages; it had nothing to do with the causation question.

The argument has been made by Mr. Yerman as to where we draw the line with respect to the applicability or nonapplicability of Noerr-Pennington. While no one has ever drawn that line

with precision, perhaps a good rule of thumb would be that you draw the line in any case where the plaintiffs claim their damages were caused by legislative conduct. There isn't any question in this case that the plaintiff throughout this litigation has contended that its damages flowed from legislative conduct in the sense that by not being adopted by the NFPA they were foreclosed from being included in the code and that is what caused their damage in the marketplace. I think the other cases relied upon by the plaintiff are legally and factually inapposite. The Court accepts the defendant's distinction of those cases because in each one of those cases the damage to the plaintiff flowed from some conduct of the defendant and not from the conduct of the legislature itself. Group boycotts, agreements not to deal—those were the factual contexts of those cases. We have been cited to no case in which damages flowed from legislative action where Noerr-Pennington has not been applied.

That is the law, and I think it requires the setting aside of the jury verdict because I find that Noerr-Pennington does apply. I find that the sham exception to Noerr-Pennington does not apply for the reasons I have given.

Therefore I will enter judgment accordingly.

That is the decision of the Court.